Lau Nam Chan v Million Crest (M) Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–69 OF 2003
CHEW SOO HO JC
26 NOVEMBER 2009

Civil Procedure — Appeal — Fresh or new evidence not raised in trial proper or memorandum of appeal — Adducing of — Whether new evidence would result in rectification of erroneous order made by trial judge — Whether misdirection by trial judge

Contract — Agreement — Agreement to pay compensation for vacant possession of premises — Construction of terms of agreement — Intention of parties — Whether written notification required before appellant entitled to compensation — Estoppel — Whether respondent by its conduct waived requirement of notice and estopped from raising issue of written notification

The respondent was a housing developer and the proprietor of the land and premises erected on the land known as No 322, Main Road, 14100 Simpang Ampat ('the premises'), while the appellant was the tenant of the premises. On 8 January 1997 the appellant and respondent entered into an agreement whereby the respondent offered to pay the appellant a sum of RM35,000 ('the compensation') for the latter to quit and deliver vacant possession of the premises. Upon execution of the agreement a sum of RM3,500 being part of the RM35,000 had been paid by the respondent to the appellant. On 17 October 1997, the appellant delivered vacant possession of the premises to the respondent and returned the keys to the premises with a letter demanding payment of the sum of RM31,500, being the balance of the agreed compensation of RM35,000. However, although the respondent accepted the keys it did not pay the appellant the balance of the compensation sum. When the respondent refused to make payment the appellant commenced an action against the respondent for the RM31,500. At the trial it was the respondent's defence that it was not liable to pay the RM31,500 because it had not given any notice in writing to the appellant for vacant possession pursuant to cl 1 of the agreement. Clause 1 of the agreement provided that the respondent had to give one month written notice to the appellant before the appellant delivered vacant possession of the premises. The respondent therefore submitted that the return of the keys and the appellant's action was premature, in that, without written notification the appellant was not entitled to the agreed balance compensation of RM31,500. The trial judge found that under cl 1 the respondent was required to give

written notice and that although the respondent acknowledged receipt of the keys and the letter of demand for the RM31,500 it had not received vacant possession but retained the right to issue the written notice. On this ground, the trial judge found the appellant's claim to be premature and hence dismissed it with costs. This was the appellant's appeal against that decision. In his appeal the appellant submitted that cl 1 of the agreement was to protect the interest of the respondent in the event that the appellant refused to deliver vacant possession and as such it was not a condition precedent that went to the root of the contract but a flexible contract term that did not prevent that appellant from delivering vacant possession without the notice. The appellant also submitted that the respondent had by its conduct waived the requirement of notice and was thus estopped from raising the issue of a written notification. The appellant further submitted that the respondent had part performed the agreement when it paid the sum of RM3,500, being 10% of the compensation, at the time of execution of the agreement thereby indicating that the notice was a flexible collateral term. The appellant also argued that the fact that the respondent had not called any evidence after the appellant had closed his case showed that the appellant's evidence was undisputed and that the appellant had proved his case. In reply, the respondent contended that cl 1 was the main term in the agreement for delivery of vacant possession and was therefore a condition of the contract between the parties. In addition, the respondent submitted that the issues raised by the appellant in this appeal, namely that cl 1 of the agreement was a flexible contract term and that the respondent's non-calling of evidence showed that the appellant had proved his case and there were issues that were not raised in the trial proper or in the memorandum of appeal and should therefore be rejected by this court.

Held, allowing the appeal with costs:

(1) The two issues, as to whether cl 1 of the agreement was a condition precedent or a flexible contract term and as to whether the trial judge had erred when he did not find for the appellant when the respondent did not adduce any evidence after the close of the appellant's case, were new points that were not pleaded or raised in the trial court. As a general rule, if these two issues were new issues they could not be raised in this appeal unless they came within one of two recognised exceptions to this general rule. In this respect, it would be necessary to consider whether the new points which were not raised in the court below would result in the rectification of an erroneous order to attract the exception to the general rule. The trial judge in the instant case had failed to consider the clear fact that the appellant had delivered not only the keys but also a letter of demand which expressed the delivery of vacant possession of the premises to the respondent. On this fact, there was therefore a clear misdirection by the trial judge when he held that the

respondent had only received the keys but had not received vacant possession of the premises. As such, the issue as to whether cl 1 was a condition precedent or a flexible contract term would fall under the exception of rectifying an erroneous order and be accordingly considered. However, the issue as to whether the trial judge had erred when he did not find for the appellant when the respondent did not adduce any evidence after the close of the appellant's case did not fall under this or any exception and ought not to be raised in this appeal (see paras 19–20 & 22).

(2) Although the appellant had not categorically used the word 'estoppel', the facts of this case showed sufficient material for them to be construed as alleging estoppel against the respondent. As the appellant had divested all his interest in the premises when he delivered the keys and vacant possession to the respondent, it was in the interest of justice that he be allowed to raise the issue of estoppel in this appeal. It also did not prejudice the respondent as it was the same facts that the appellant was alleging all along in the court below and in this appeal (see para 24).

(3) The appellant's evidence that he was offered RM35,000 as compensation to vacate the premises and the fact that the parties had entered into the agreement for this purpose was unchallenged by the respondent and must be accepted as the actual intention of the parties at the time of the execution of the agreement (see para 25).

(4) Clause 1 of the agreement should not be read in isolation but in the light of the whole agreement and in particular cl 2 which required the respondent to pay 10% of the agreed compensation at the time of the execution of the agreement. Although cl 1 was one of the main terms of the agreement the prerequisite of notice within cl 1 had been overtaken by the respondent having made payment of RM3,500 showing that the respondent had agreed to pay the compensation and had indeed paid 10% of it. The respondent cannot invoke s 53 of the Contracts Act 1950 as the doctrine of estoppel would apply to restrain it from doing so. As such cl 1 is not a condition precedent going to the root of the contract (see para 28).

(5) The respondent by conduct had not denied the acceptance of vacant possession delivered by the appellant to it on 17 October 1997. It had neither asserted the requirement of cl 1 of the agreement of the need to give written notice of one month nor denied that the appellant was entitled to the balance sum of RM31,500. It kept quiet for five years until the appellant had filed the present action against it before raising the defence of written notification of one month for the delivery of vacant possession under cl 1 of the agreement. To deprive the appellant of the agreed compensation in violation of the intent and purpose of the agreement or of his expectation to receive the balance sum of

RM31,500 was an injustice to the appellant for which the doctrine of estoppel should aptly be applied to do justice in the circumstances of this case (see paras 31 & 33).

[Bahasa Malaysia summary

Responden merupakan pemaju perumahan dan tuan punya tanah dan premis-premis yang dibina atas tanah yang dikenali sebagai No 322, Main Road, 14100 Simpang Ampat ('premis-premis tersebut'), manakala perayu merupakan penyewa premis-premis tersebut. Pada 8 Januari 1997, perayu dan responden telah menandatangani satu perjanjian di mana responden telah membuat tawaran untuk membayar perayu sejumlah RM35,000 ('pampasan') agar ia keluar dan menyerahkan milikan kosong premis tersebut. Setelah perjanjian disempurnakan sejumlah RM3,500 yang merupakan sebahagian daripada RM35,000 tersebut telah dibayar oleh responden kepada perayu. Pada 1 Oktober 1997, perayu telah menyerahkan milikan kosong premis tersebut kepada responden dan menyerahkan kunci-kunci kepada premis tersebut bersama surat menuntut pembayaran sejumlah RM31,500, yang merupakan baki pampasan yang dipersetujui sejumlah RM35,000. Walau bagaimanapun, meskipun responden telah menerima kunci-kunci tersebut ia tidak membayar perayu baki jumlah pampasan itu. Apabila responden enggan membuat pembayaran perayu telah memulakan tindakan terhadap responden untuk RM31,500 itu. Semasa perbicaraan, pembelaan responden adalah bahawa ia tidak bertanggungjawab untuk membayar RM31,500 tersebut kerana ia tidak diberikan apa-apa notis secara bertulis kepada perayu untuk milikan kosong menurut fasal 1 kepada perjanjian. Fasal 1 kepada perjanjian itu memperuntukkan bahawa responden perlu memberikan notis sebulan secara bertulis kepada perayu sebelum perayu menyerahkan milikan kosong premis tersebut. Responden dengan itu menghujahkan bahawa pemulangan kunci-kunci tersebut dan tindakan perayu adalah pramatang, yang mana, tanpa pemberitahuan secara bertulis perayu tidak berhak terhadap baki pampasan RM31,500 yang telah dipersetujui. Hakim perbicaraan mendapati bahawa di bawah fasal 1 responden dikehendaki memberikan notis secara bertulis dan bahawa meskipun responden mengakui penerimaan kunci-kunci tersebut dan surat tuntutan untuk RM31,500 itu ia tidak menerima milikan kosong tetapi mengekalkan hak untuk mengeluarkan notis secara bertulis. Atas alasan ini, hakim perbicaraan mendapati tuntutan perayu adalah pramatang dan justeru itu menolaknya dengan kos. Ini adalah rayuan perayu terhadap keputusan tersebut. Dalam rayuannya perayu menghujahkan bahawa fasal 1 kepada perjanjian adalah untuk melindungi kepentingan responden sekiranya perayu enggan menyerahkan milikan kosong dan dengan itu ia bukan syarat duluan yang menjurus kepada akar umbi kontrak tetapi suatu terma kontrak fleksibel yang tidak menghalang perayu daripada menyerahkan milikan kosong tanpa notis. Perayu juga menghujahkan bahawa responden melalui perlakuannya telah mengetepikan keperluan notis dan oleh itu diestop daripada

menimbulkan isu pemberitahuan secara bertulis. Selanjutnya perayu berhujah bahawa responden telah melaksanakan sebahagian daripada perjanjian itu apabila ia telah membayar sejumlah RM3,500, iaitu 10% daripada pampasan, pada masa penyempurnaan perjanjian yang menunjukkan bahawa notis itu merupakan terma kolateral yang fleksibel. Perayu juga berhujah tentang hakikat bahawa keterangan perayu tidak dipertikaikan dan bahawa perayu telah membuktikan kesnya. Sebagai jawapan, responden menegaskan bahawa fasal 1 merupakan terma utama dalam perjanjian untuk penyerahhakan milikan kosong dan dengan itu merupakan syarat kontrak antara pihak-pihak. Selain itu, responden berhujah bahawa isu-isu yang ditimbulkan oleh perayu dalam rayuan ini, iaitu bahawa fasal 1 kepada perjanjian adalah terma kontrak yang fleksibel dan bahawa kegagalan responden mengemukakan keterangan menunjukkan bahawa perayu telah membuktikan kesnya dan terdapat isu-isu yang tidak ditimbulkan dalam perbicaraan sebenar atau dalam memorandum rayuan dan oleh itu patut ditolak oleh mahkamah ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kedua-dua isu tersebut, tentang sama ada fasal 1 kepada perjanjian merupakan syarat duluan atau terma kontrak yang fleksibel dan tentang sama ada hakim perbicaraan terkhilaf apabila beliau tidak membuat keputusan menyebelahi perayu kerana responden tidak mengemukakan apa-apa keterangan selepas kes perayu ditutup, adalah perkara-perkara baru yang tidak diplid atau ditimbulkan dalam mahkamah perbicaraan. Sebagai rukun am, jika kedua-dua isu tersebut merupakan isu-isu baru ia tidak boleh ditimbulkan dalam rayuan ini kecuali ia terangkum dalam salah satu daripada dua pengecualian yang diakui terhadap rukun am ini. Sehubungan itu, adalah perlu untuk mempertimbangkan sama ada perkara-perkara baru tersebut yang tidak pernah dibangkitkan di mahkamah sesyen akan mengakibatkan pembetulan perintah yang salah untuk membangkitkan pengecualian kepada peraturan am. Hakim perbicaraan dalam kes ini telah gagal untuk mempertimbangkan fakta yang jelas ini bahawa perayu bukan sahaja telah menyerahkan kunci-kunci tersebut tetapi juga surat tuntutan yang menyatakan tentang penyerahhakan milikan kosong premis tersebut kepada responden. Berdasarkan fakta ini, adalah jelas terdapat penyalaharahan oleh hakim perbicaraan apabila beliau memutuskan bahawa responden telah hanya menerima kunci-kunci tersebut tetapi tidak menerima milikan kosong premis tersebut. Oleh itu, isu-isu tentang sama ada fasal 1 merupakan syarat duluan atau terma kontrak yang fleksibel terangkum di bawah pengecualian untuk memperbetulkan perintah yang salah dan dipertimbangkan sewajarnya. Walau bagaimanapun, isu tentang sama ada hakim perbicaraan terkhilaf apabila beliau tidak membuat keputusan menyebelahi perayu apabila responden tidak

mengemukakan apa-apa keterangan setelah penutup kes perayu tidak terangkum di bawah pengecualian ini atau mana-mana pengecualian dan tidak patut ditimbulkan dalam rayuan ini (lihat perenggan 19–20 & 22).

(2) Meskipun perayu tidak secara kategori menggunakan perkataan 'estoppel', fakta kes ini menunjukkan bahan yang mencukupi untuk mentafsirkannya sebagai mengatakan estopel terhadap responden. Oleh sebab perayu telah melucutkan kesemua kepentingannya dalam premis tersebut apabila dia menyerahkan kunci-kunci tersebut dan milikan kosong kepada responden, demi keadilan, dia harus dibenarkan menimbulkan isu estopel dalam rayuan ini. Ia juga tidak memprejudiskan responden kerana ianya fakta-fakta sama yang perayu telah bangkitkan sepanjang perbicaraan di mahkamah sesyen dan dalam rayuan ini (lihat perenggan 24).

(3) Keterangan perayu bahawa dia telah menawarkan RM35,000 sebagai pampasan untuk mengosongkan premis tersebut dan fakta bahawa pihak-pihak telah menandatangani perjanjian bagi tujuan ini tidak dicabar oleh responden dan hendaklah diterima sebagai niat sebenar pihak-pihak pada masa penyempurnaan perjanjian itu (lihat perenggan 25).

(4) Fasal 1 kepada perjanjian tidak patut dibaca secara berasingan tetapi dalam keseluruhan perjanjian dan khususnya fasal 2 yang memerlukan responden membayar 10% daripada pampasan yang dipersetujui pada masa penyempurnaan perjanjian itu. Meskipun fasal 1 adalah salah satu daripada terma-terma utama perjanjian pra syarat notis dalam fasal 1 telah dilaksanakan oleh responden dengan membuat pembayaran RM3,500 yang menunjukkan bahawa responden telah bersetuju untuk membayar pampasan dan sememangnya telah membayar 10% daripadanya. Responden tidak boleh menggunakan s 53 Akta Kontrak 1950 kerana doktrin estopel terpakai untuk menghalangnya daripada berbuat sedemikian. Oleh itu fasal 1 bukan syarat duluan yang merujuk kepada akar umbi kontrak (lihat perenggan 28).

(5) Responden melalui perlakuan tidak menafikan penerimaan milikan kosong yang diserahkan oleh perayu kepadanya pada 17 Oktober 1997. Ia juga tidak menegaskan keperluan fasal 1 perjanjian tersebut tentang keperluan untuk memberikan notis sebulan secara bertulis mahupun menafikan bahawa perayu berhak terhadap jumlah baki RM31,500. Ia berdiam diri selama lima tahun sehingga perayu memfailkan tindakan ini terhadapnya sebelum menimbulkan pembelaan pemberitahuan sebulan secara bertulis untuk penyerahhakan milikan kosong di bawah fasal 1 kepada perjanjian itu. Dengan menafikan pampasan yang dipersetujui terhadap perayu yang bertentangan dengan niat dan tujuan perjanjian atau jangkaannya untuk menerima jumlah baki RM31,500

merupakan ketidakadilan kepada perayu di mana doktrin estopel sewajarnya patut terpakai demi keadilan berdasarkan keadaan kes ini (lihat perenggan 31 & 33).]

Notes

For cases on agreement in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2422–2432.

For cases on appeal in general, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 633–1552.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Daihatsu (M) Sdn Bhd v Seni Jaya Sdn Bhd [2001] 3 MLJ 186, HC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd [2002] 2 MLJ 139; [2002] 1 CLJ 449, CA (folld)

Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors [1989] 2 MLJ 416; [1989] 1 CLJ (Rep) 116, SC (refd)

Legislation referred to

Contracts Act 1950 ss 38(1), 53

Evidence Act 1950 s 115

V Muthusamy (Yeap Chin Pho with him) (Sharifah, CP Yeap & Co) for the appellant.

Ong Wee En (Sharizat, Rashid & Lee) for the respondent.

Chew Soo Ho JC:

[1] The issue of this appeal revolves around the interpretation of the agreement made on 8 January 1997 between the appellant and the respondent in particular cl 1 and cl 2 therein in that whether the respondent must give a written notification before the appellant can quit and deliver complete vacant possession of the premises within one month to the respondent or can the appellant quit and deliver vacant possession without such written notification and yet is entitled to the agreed balance compensation of RM31,500?

[2] The appellant's/plaintiff's claim was for a sum of RM31,500 being the balance of the agreed compensation money for the delivery of vacant

possession of premises No 322, Main Road, 14100 Simpang Ampat erected on land held under Lot No 457, Mukim 14, Seberang Perai Selatan pursuant to the agreement made on 8 January 1997 between the parties herein which was produced as exh P1 in the trial court below (pp 41–44 of the appeal record). Upon execution of P1, a sum of RM3,500 being part of the RM35,000 had been paid by the respondent to the appellant vide cl 2(i) in P1.

[3] The respondent was a housing developer and was the proprietor of the aforesaid land where the said premises was and the appellant was the tenant of the said premises as per the preamble of the said agreement exh P1.

[4] On 17 October 1997, the appellant delivered vacant possession of the said premises to the respondent by handing to the respondent the keys of the premises which were duly acknowledged receipt by the respondent on same date vide the appellant's letter at p 45 of the appeal record, exh P2. The respondent had failed to pay the balance of RM31,500 upon the appellant's request vide his same letter of delivery of vacant possession P2 and also failed to heed the demand by appellant's solicitors through a letter to the respondent dated 9 October 2001 (p 46 of the appeal record). Hence, the suit was filed in the sessions court.

[5] In the sessions court, the appellant testified that he was previously occupying the said premises No 322, Main Road, Simpang Ampat and he was offered RM35,000 to vacate the premises. The agreement dated 8 January 1997 was then made with the respondent. After he had delivered vacant possession and the keys to the premises to the respondent, the latter accepted them but refused to pay the balance compensation of RM31,500. In cross-examination, appellant said that he knew respondent as a developer and was aware that the respondent wanted to develop the land where the said premises was erected. He did not agree that the said agreement was to pay compensation when the respondent wanted to develop the land only. On question by the trial court, the appellant said that he asked his friend to prepare his letter P2 giving vacant possession and keys to the respondent and requesting for the sum of RM31,500. He asserted that by the agreement the respondent had to pay him the compensation. He did not take back the keys though the respondent did not pay him at that time.

[6] The respondent had not adduced any evidence after the close of the appellant's case.

[7] The learned sessions judge in his grounds of judgment had made the findings that according to the agreement P1, the respondent had wanted vacant possession of the aforesaid premises and the appellant who was

occupying the said premises had agreed to deliver complete vacant possession to the respondent on the condition that the respondent paid him RM35,000 compensation. However, the learned sessions judge found that under cl 1 of the said agreement, the respondent was required to give the written notice. He further found that the respondent by acknowledging receipt of the letter P2 and the keys of the said premises did not receive vacant possession of the premises as the respondent retained the right to issue the written notice. On this ground, the learned sessions judge held that the appellant's claim was premature and hence dismissed the appellant's claim with costs.

[8] The appellant's counsel Dato' V Muthusamy submitted in this appeal that the objective and intention of the parties were that the respondent wanted peaceful vacant possession of the said premises and the appellant agreed to deliver complete vacant possession of the said premises pursuant to preamble 3 and 4 in the said agreement, P1. By cl 2(i) and (ii) of P1, respondent paid a sum of RM3,500 upon execution of P1 and the balance of RM31,500 shall be paid when the appellant quits and delivers vacant possession of the said premises. When the appellant delivered vacant possession on 17 October 1997 and demanded for payment of the RM31,500, the respondent acknowledged receipt without any objection. On the respondent's defence that they are not liable to pay the said balance sum because they had not given any notice in writing to the appellant for vacant possession pursuant to cl 1 of P1, learned counsel for the appellant submitted that this issue was never raised when the respondent accepted the keys and vacant possession from the appellant on 17 October 1997 or thereafter nor did the respondent return the keys to the appellant. This issue was only raised on 8 August 2002 in the respondent's defence of almost five years later. The appellant submitted the words 'within a period of one (1) month from the date of written notification' in cl 1 of P1 was to protect the interest of the respondent in the event that the appellant refuses to deliver vacant possession. It is not a condition precedent going to the root of the contract but a flexible collateral term as it did not state that the appellant could not deliver possession without notice. By delivering vacant possession of the premises, the appellant had waived the requirements of any notice. The respondent had also by conduct and acquiescence accepted and waived the requirement of notice. Hence the appellant contended that the respondent is estopped from raising this issue citing s 115 of the Evidence Act 1950 in support. The appellant also referred to the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 and the case of *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 of the English Court of Appeal on the doctrine of estoppel by which justice is done.

[9] On the non-calling of any evidence by the respondent after the appellant/plaintiff had closed his case, learned counsel for the appellant submitted that there was no evidence of the respondent's defence and therefore the evidence of the appellant being undisputed and unchallenged, had proved the appellant's claim and judgment should have been entered. The Supreme Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 was referred to in support of the contention. Learned counsel for the appellant also contended that the learned sessions judge had misdirected himself when he held, inter alia, that in the opinion of the court, the respondent did not admit having received delivery of vacant possession though they admitted receiving the keys to the premises and therefore the appellant's claim was premature.

[10] Another point of interest submitted by the appellant is the payment of the sum of RM3,500 being 10% of the RM35,000 agreed compensation. The respondent had part-peformed the agreement indicating that the compensation was payable upon complete delivery of vacant possession. Hence the notice was a flexible collateral term.

[11] Finally, quoting s 38(1) of the Contracts Act 1950, the appellant submitted that there is nothing in the Contracts Act to prevent parties from performing their respective agreed obligation. Thus, it cannot be held to be premature.

[12] The respondent on the other hand, place emphasis on cl 1 of P1 that it is a condition for the respondent to give one month written notification before the appellant can deliver vacant possession of the premises. Section 53 of the Contracts Act 1950 is referred.

[13] In reply to the appellant's contention that cl 1 is not a condition precedent going to the root of the contract but a flexible collateral term and that this clause did not state the tenant cannot deliver possession without notice, learned counsel for the respondent, Miss WE Ong submitted that it is wrong to have so submitted by the appellant as cl 1 is the main term for delivery of vacant possession. In addition, respondent submitted this issue should be rejected by this court as it was not raised or submitted in the court below nor was it raised in the memorandum of appeal citing *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors* [1989] 2 MLJ 416; [1981] 1 CLJ (Rep) 116 (SC) and *Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd* [2002] 2 MLJ 139; [2002] 1 CLJ 449 (CA).

[14] On the one month written notification, the respondent submitted that though the respondent had accepted the keys to the said premises, it does

not show that the respondent had waived the provision of cl 1 in P1 as there is no responsibility in law for the respondent to return the keys citing the High Court case of *Daihatsu (M) Sdn Bhd v Seni Jaya Sdn Bhd* [2001] 3 MLJ 186. Thus, the respondent submitted that the return of the keys was premature and the whole action of the appellant was premature.

[15] Learned counsel for the respondent contended that the findings of the sessions judge that the return of the keys did not signify the acceptance or receipt of the delivery of vacant possession is correct.

[16] On the issue of no evidence from the respondent after the appellant had closed his case, the respondent submitted that the sessions judge had ruled that the construction and meaning of cl 1 of P1 is a matter for the court to decide. P1 was not in dispute so was the fact that the respondent had received the keys from the appellant. In addition, the respondent submitted that the issue of non-calling of evidence by the respondent was also not raised in the submission in the trial proper and ought to be rejected in the appeal.

[17] Finally, the respondent contended it is a fact that the respondent did not issue any written notification to the appellant and therefore the appellant could continue to rent the premises until the respondent as landlord issues the appellant with a notice for him to deliver vacant possession.

[18] From the written submission as well as oral clarifications of both parties as recapitulated above, the issues submitted in this appeal can be deduced as follows:

(a) What was the actual intention of the parties at the time of the execution of P1?

(b) Is cl 1 a condition precedent going to the root of the contract or is it a flexible collateral term?

(c) Was there waiver and acquiescence and whether estoppel applies?

(d) When the respondent did not adduce any evidence after the close of the appellant's case, must the sessions judge necessarily find the evidence of the appellant to have been proved and forthwith enter judgment for the appellant?

(e) Did the sessions judge misdirect himself in coming to his finding that the respondent had received the keys but did not receive delivery of vacant possession of the premises?

[19] From the above issues submitted, the respondent argued that issues (b) and (d) ought to be rejected by this court as they were not raised or submitted in the court below nor were they raised in the memorandum of appeal. I propose to deal with them first. In *Muniandy & Anor v Muhammad Abdul Kader s/o Muhamad Saheed & Ors* it was held that 'as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below. This rule is subject to certain exceptions' and two exceptions adopted are: 'first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and secondly, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order.' Similar principle of law is restated in *Manharlal Bhaichand Ghatani* by the Court of Appeal. Admittedly, the issue or the question of jurisdiction does not arise in this appeal. The consideration is whether the new point raised which were not raised in the court below would result in the rectification of an erroneous order to attract the second exception as set out in *Muniandy*'s and *Manharlal Bhaichand Ghatani*'s cases above. With that, I will turn to consider the fifth issue submitted above whether the learned sessions judge had erred in coming to his findings as to make his order erroneous. It is an undeniable fact that vacant possession is the basis of the agreement P1 between the appellant and the respondent. Hence if vacant possession was not delivered or if vacant possession was not received, then there is no question of compensation to be payable by the respondent to the appellant. Such determination is thus crucial. The finding of the sessions judge is that although the appellant had delivered the keys to the premises which the respondent acknowledged receipt, the receipt of the keys did not constitute the delivery or acceptance of vacant possession. His reason being that the respondent did not give notice to demand for it. I am afraid I do not agree; the keys to a premises are the very basis that a person will be able to enter the premises and take possession of the premises. In this case, when the appellant delivered the keys to the said premises to the respondent, by itself, it must be construed to signify he had relinquished possession of the said premises and that he has surrendered possession of the premises to the respondent. Adding to that, the contents of P2, the appellant's letter to the respondent when he delivered the keys to the respondent, apart from stating that he delivered the keys to the said premises to the respondent, vividly expressed the delivery of vacant possession of the said premises to the respondent when the appellant stated in this letter the following words:

...

I herely deliver the keys to and the *vacant possession* of the said premises to you ...

[20] This letter and the keys were duly received by the respondent. There is no evidence at all that the respondent had ever denied or refuted P2 to the effect that the respondent had not received vacant possession of the said premises subsequent to the acknowledgement of P2 though they had received the keys to the premises. From this evidence before the learned sessions judge, I find that the learned sessions judge had failed to consider the clear fact that vide P2, the appellant had delivered not only the keys but also vacant possession of the said premises to the respondent on 17 October 1997; this is expressed in P2 itself and they were accepted unequivocally by the respondent who did not challenge this fact in cross-examination. To contend otherwise in the absence of any evidence to show that they had refuted or denied at the first opportunity, is unattainable. On this fact, there is, therefore, a clear misdirection by the sessions judge when he held that the respondent had only received the keys but had not or did not receive vacant possession of the premises. If the learned sessions judge had directed himself correctly on the evidence before him, I am of the view that he might not have held the appellant's claim to be premature. There is therefore a need for this error to be rectified.

[21] For the above reasons, I will allow the appellant to raise the second issue and will accordingly consider the submission by both parties on this point as it falls under the second exception as propounded in *Muniandy* and *Manharlal Bhaichand Gathani*.

[22] On the fourth issue of the respondent not tendering any evidence at the end of the appellant's case in the court below, it was neither raised and submitted in the trial court nor raised in the memorandum of appeal. I find no reason to allow this new point of law and fact to be raised as it does not come within the exception as stipulated in the *Muniandy*'s case and *Manharlal*'s case above. Therefore, I do not propose to elaborate further. Even if I am to consider this issue, I will say that at the end of the plaintiff's case and even though the defendant did not adduce any evidence, the sessions judge was still duty bound to assess the plaintiff's case and evidence adduced to ascertain whether the plaintiff had proved his case as pleaded against the defendant on a balance of probabilities. It should not be misconstrued that when the defendant did not tender any evidence, the court must necessarily find that the plaintiff had proved his case without having to evaluate the evidence which may show otherwise. The plaintiff's case could still be dismissed if the court upon proper evaluation of the whole case finds that the plaintiff has failed to prove his case against the defendant though the defendant did not produce any evidence.

[23] On the question of estoppel as provided in s 115 of the Evidence Act 1950 which was also not raised or submitted nor raised in the memorandum

of appeal, the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 had held in the following:

> Held: ...
>
> (4) It is correct to state that estoppel is a matter which requires to be pleaded under the rules of court, as exemplified by rr 7(1) and 8(1) of O 18 of the Rules of the High Court 1980. However, the requirement of these rules is sufficiently met if the material facts giving rise to estoppel are sufficiently pleaded without actually using the term 'estoppel'. Thus, although courts do normally require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle.
>
> (5) A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is the interest of justice to do so. It is really a matter of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case ...

[24] In the instant case the appellant had all along contended that the respondent had taken no action in particular after having received the keys and vacant possession from the appellant on 17 October 1997 and the appellant's solicitor's letter to them until the action was filed in the sessions court in 2002 which was about five years later before the respondent raised and pleaded in the defence that they were not liable to pay the sum of RM31,500 on grounds that they did not give a written notice under cl 1 of P1. I am of the view that although the appellant had not categorically used the word 'estoppel', the fact of this case showed sufficient materials to enable them to be construed as alleging estoppel against the respondent. The appellant had divested all his interest in the premises when he delivered the keys and vacant possession to the respondent. It is in the interest of justice that he be allowed to raise this question of law. It also does not prejudice the respondent as it was the same facts that the appellant was alleging all along in the court below and in this appeal. This issue of estoppel will therefore be allowed to be raised in this appeal. I will now proceed to determine the three issues in contention by both parties.

FIRST ISSUE: WHAT WAS THE INTENTION OF THE PARTIES AT THE MATERIAL TIME OF THE SIGNING OF THE AGREEMENT?

[25] From the contents of the agreement P1 between the parties herein, I find no doubt that the intention of both parties at the time of the execution of the agreement is amply clear that the respondent wanted complete vacant possession of the premises erected on their land and the appellant agreed to do so on a consideration of RM35,000. The preamble as set out in paras 3 and 4 in P1 expressed that the respondent desired to secure peaceful

vacant possession of the said premises and the appellant had agreed to deliver complete vacant possession. According to the evidence of the appellant vide p 30 of the appeal record, he was previously living at 322, Main Road, Simpang Ampat, the said premises and he was offered RM35,000 to vacate the said premises. For that, P1 dated 8 January 1997 was then made with the respondent. This evidence was unchallenged by the respondent and must be accepted as the fact as to the actual intention of the parties.

SECOND AND THIRD ISSUES: WHETHER CL 1 IS A CONDITION PRECEDENT GOING TO THE ROOT OF THE CONTRACT OR WHETHER IT IS A FLEXIBLE COLLATERAL TERM AND WHETHER WAIVER, ACQUIESCENCE AND ESTOPPEL APPLY IN THE CIRCUMSTANCES OF THIS CASE

[26] Clause 1 of P1 provides as follows:

Compensation

1. In consideration of the Second Party (Appellant) to quit and deliver complete vacant possession of the said premises to the First Party (Defendant) within a period of one (1) month from the date of written notification, the First Party hereby agree to compensate the Second Party a sum of RM35,000.00 payable in the manner stated in clause 2 hereto.

Clause 2 states:

2. The said compensation sum of RM35,000.00 stated in clause 1 hereto shall be paid as follows:

(i) a sum of RM3,500.00 shall be paid upon execution of this agreement; and

(ii) The final sum of RM31,500.00 shall be paid upon the Second Party quit and deliver vacant possession of the said premises to the First Party and Second Party complying with clause 4 and 6.

[27] Clauses 4 and 6 talk about the appellant having to remove all personal effects from the said premises and the appellant having to demolish the said premises and disconnect the water and electricity supply at his own costs and expenses.

[28] Clause 1 as it appears and interpreted by the learned sessions judge in this case is that only upon the written notification from the respondent to the appellant that the appellant shall within one month quit and deliver complete vacant possession of the said premises to the respondent. This will simply mean that if the respondent had never given the written notification to the appellant, the appellant had to remain in the said premises only and would never be able to enjoy the agreed compensation although he had delivered

vacant possession of the said premises to the respondent. Reading cl 1 as it appears the learned sessions judge cannot be faulted for interpreting cl 1 to read as it is as the wordings or phraseology used unequivocally say so. However, cl 1 should not be read in isolation but should be read in the light of the whole agreement and in particular with cl 2 on the mode of payment. Vide cl 2(i), the respondent had made the 10% payment out of the RM35,000 compensation to the appellant upon execution of the said agreement without a written notification requiring the appellant to quit and deliver. The fact that the respondent had made the payment of 10% of the agreed compensation vide cl 2(i) had subdued the pre-requisite for notice in cl 1 which would lead the appellant to an expectation that he would be paid whenever he delivered vacant possession of the said premises to the respondent. Clause 1 is one of the main terms of the agreement but the pre-requisite of notice within cl 1 had been overtaken by the event that respondent had made payment of RM3,500 showing that the respondent had agreed to pay the compensation and had indeed paid 10% of it. The respondent cannot approbate and reprobate. The respondent cannot invoke s 53 of the Contracts Act 1950 to say that 'where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order'. The doctrine of estoppel would apply to restrain the respondent as it would be unjust to do so; see further discussion below. In the light of the above, cl 1 is not a condition precedent going to the root of P1.

[29] The respondent had acknowledged receipt of the keys and vacant possession of the said premises on 17 October 1997 vide P2 and was given notice of the request for payment of the balance sum of compensation of RM31,500 within the same P2 which asserted expressly:

> ...
>
> I hereby deliver the keys to and vacant possession of the said premises to you subject to your payment of the balance of the compensation sum of RM31,500.00 to me within seven (7) days from the date hereof.
>
> ...

[30] Having received the aforesaid keys to the said premises and vacant possession, the respondent did not pay neither did they contend that the appellant was premature in his action to deliver vacant possession because the respondent had not issued a written notification to request or demand for it pursuant to cl 1 nor did they complain that appellant did not comply with cll 4 and 6 to remove all personal belongings, disconnect water and electricity supply and demolish the building at appellant's own expenses; they also did not write to reply to P2 to inform the appellant that they denied receiving vacant possession but that they only received the keys. The respondent also

did not return the keys to the premises to the appellant to enable him to continue with the possession of the said premises nor inform the appellant that they were not ready to accept delivery of vacant possession. They simply accepted and ignored the appellant's request for the balance sum of the agreed compensation. The fact that the respondent had accepted the keys and vacant possession of the said premises from the appellant without raising any objection whatsoever, by their aforesaid conduct, tantamount to their waiver of the terms of the contract in P1, in particular, cl 1 and cll 4 and 6 therein as well as acquiesced to the delivery of vacant possession of the said premises without the respondent having to issue a written notification to the appellant to do so within one month and without the appellant having to comply with cll 4 and 6 pursuant to cl 2(ii).

[31] From the facts stated in the preceding paragraphs, I find that the respondent by conduct had not denied the acceptance of vacant possession delivered by the appellant to them on 17 October 1997, They had not asserted the requirement of cl 1 in P1 of the need to give a written notice of one month nor the requirement to comply with cll 4 and 6 by the appellant. They did not deny that the appellant had claimed for the balance compensation sum of RM31,500 which he had expected to be paid vide P2 nor that the appellant was entitled to that balance sum. They kept quiet for almost five years until an action had been filed to claim that sum from them; only then, the defence of written notification of one month for the delivery of vacant possession under cl 1, inter alia, was pleaded and raised for the first time. By the indifferent conduct of the respondent, I must agree with the appellant that justice of the case would demand that the respondent be estopped from raising such an issue which, if the respondent truly wanted to raise, they should have done so and put the appellant to notice soon after he had delivered vacant possession of the said premises to the respondent and not ignoring the appellant in total for five long years to only raise it in their defence in this case. This would have given rise to an impression leading the appellant to believe that cl 1 in P1 was not an issue. It is therefore unjust for the respondent to resile from what they had seemingly represented by their conduct. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*, the Federal Court held, inter alia:

Held:

(a) ...

(b) The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless.

(c) It is not an integral part of the estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponents' acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all it needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

...

[32] Section 115 of the Evidence Act 1950 provides:

When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[33] The whole intent and purpose of P1 is explicit. The respondent wanted vacant possession of the premises erected on their land and in consideration of the appellant agreeing to quit and deliver vacant possession of the said premises, the respondent agreed to compensate the appellant the sum of RM35,000 of which RM3,500 had been paid upon execution of the said agreement P1. The doctrine of estoppel as well explained in *Boustead*'s case is of wide utility with the prime objective of achieving justice. To deprive the appellant of the agreed compensation in violation of the intent and purpose of P1 or of his expectation to receive the balance sum of RM31,500 is an injustice to the appellant for which the doctrine of estoppel should aptly be applied to do justice in the circumstances of this case. I hold that the respondent should be estopped from their reprobation after approbation and from their contention that they did not receive vacant possession by virtue of the issue of pre-requisite notice under cl 1 in P1 to defeat justice in the instant case. When the appellant had performed his obligation to deliver vacant possession of the said premises to the respondent, justice so demands that the respondent must fulfill their obligation to pay as the parties have agreed.

[34] Having considered this appeal and all arguments of both parties, this court holds that the appeal ought to be allowed. Order of the sessions judge dismissing the appellant's claim is therefore set aside. Judgment is entered for the appellant in the sum of RM31,500 with interest at 8%pa from

17 October 2001 to the date of realisation and costs in the court below. For this appeal, this court awards cost of RM5,000 to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan